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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 278

CARLOS ESTEVA, JR., *Petitioner,*

vs.

THE HOUSE OF SEAGRAM, INC., *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Opinion and Record in Court of Appeals Is Appended Hereto)

JAY E. DARLINGTON,
306 Hammond Bldg.,
Hammond, Indiana,
Attorney for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Opinion and Record in Court of Appeals Is Appended Hereto)

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

The above named Petitioner respectfully petitions this Court to grant its Writ of Certiorari to review the judgment of said Court of Appeals which affirmed a judgment of the United States District Court for the Northern District of Illinois, Eastern Division (Hon. A. Robson) dismissing with prejudice the Petitioner's civil action.

Opinions Below

The Court of Appeals' opinion, set forth in the Appendix of this petition at pages 1a-6a, is reported in:

Esteva v. *The House of Seagram, Inc.* (C. A. 7, 1963). 314 F. 2d. 827.

No opinion was filed by the District Court.

Grounds for Invoking this Court's Jurisdiction

This Court's general jurisdiction to review final civil judgments of the Courts of Appeals is invoked, *based upon* 28 U.S.C. 1254(1).

The Court of Appeals' opinion and judgment of affirmances was rendered on February 11, 1963 (Appendix, 1a and 7a). This Petitioner filed a timely petition for rehearing (Appendix, 13a) which was entertained on the merits and was denied by said Court, without opinion, on April 15, 1963. (Appendix, 18a). The 90th day for filing this Petition was July 15, 1963 (excluding Sunday, July 14). Petitioner filed his motion on July 15, to extend the time for filing this Petition one day until July 16, 1963, which was granted, and this Petition is filed on said date.

Questions Presented for Review

(1)

Primarily, the only question which requires review at this stage of the case is Petitioner's contention that *jurisdiction of the subject matter* of this case (based upon diversity of citizenship only) *did not appear on the face of the record* in the District Court at the time that Court entered judgment dismissing plaintiff's complaint on the merits, nor

was this defect cured (if it could be cured) by any showing in the record of the Court of Appeals.

Though this alleged jurisdictional defect was presented to the Court of Appeals by this Petitioner (Appendix hereof, 8a-12a), and was answered *on the merits* by the Respondent (Appendix hereof, 16a), the Court of Appeals refused to consider same, or if considered, refused to state its *reasons for sustaining* its questioned jurisdiction.

Accordingly, while the Supreme Court *may*, in its discretion, consider and rule upon this *jurisdictional* question, it may also, as prayed in this petition, *summarily order the Court of Appeals to render its opinion and give its reasons upholding its questioned jurisdiction of the subject matter*, thus saving needless labor of this Court, and also of the parties, on this basic subject.

(2)

If this Court does see fit to *perform the Court of Appeals' task of determining and stating the reasons sustaining jurisdiction of the subject matter*, then comes the question of the *merits* of Petitioner's allegation that the record in the District Court, and in the Court of Appeals, *failed to show on its face jurisdiction of the subject matter*, which is a fatal defect. (Appendix hereof, 8a-12a).

(3)

If this Court determines that jurisdiction of the subject matter existed below, there remains Petitioner's contention that basic error exists in the District Court's *failure to make Findings of Fact* and *Conclusions of Law*, to sustain its judgment of dismissal on the merits. (Appendix hereof, 9a-11a).

Statutes and Rules Involved

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) Citizens of different states;

* * * * * * *

"(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the state where it has its principal place of business."

28 U.S.C. 1332(a) and (c)

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * * If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."

Rule 52(a)

Concise Statement of the Case

Since the *merits* of the case are not here involved, it will suffice to say that the Petitioner (plaintiff below) *sued Browne-Vintners Company, Inc.* in the District Court below

in a civil action for a money judgment of $1,000,000. (Rec. Appendix printed below, pp. A8-A12).

Following Answer on the merits by said defendant, the only defendant served below (Rec. Appendix below, p. A-13), the *trial* of the case started on March 12, 1962 (Rec. Appendix below (p. A-17, A-37). The trial ended by a *judgment of dismissal on the merits on the Court's own motion* on the *second day of the trial*, March 13, 1962. (Rec. App. below, A-32-35, 39).

Petitioner seeks review of this judgment of dismissal on the merits.

Argument

To avoid unnecessary repetition of argument, which the Petitioner understands this Court's Rules are designed to avoid, he respectfully asks leave to adopt as his Argument and his authorities herein, his Petition and Motion for Rehearing (Appendix hereof, 8a, and 13a, hereof).

Wherefore, Petitioner respectfully prays that the Judgment of the Court of Appeals be reversed, with all proper relief.

JAY E. DARLINGTON,
306 Hammond Bldg.,
Hammond, Indiana,
Attorney for Petitioner.

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1962—JANUARY SESSION, 1963

No. 13815

CARLOS ESTEVA, JR., *Plaintiff-Appellant,*

vs.

THE HOUSE OF SEAGRAM, INC., *Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

February 11, 1963

Before KNOCH, CASTLE and KILEY, *Circuit Judges.*

CASTLE, *Circuit Judge.* In August of 1955, Carlos Esteva, Jr., plaintiff-appellant, commenced this diversity action in the District Court against Brown-Vintners Co., Inc. and certain other defendants [1] to recover damages in the sum of $1,000,000.00 alleged to represent "unjust enrichment" obtained by the defendants through a conspiracy by which the plaintiff was induced to furnish certain information, advice, formulas and processes in reliance upon representations made to him with respect to benefits and positions he was to receive in return but of which he was deprived as a part of the conspiracy. On March 13, 1962, the District Court dismissed the action, with prejudice, for want of prosecution. The plaintiff appealed.

From the contentions advanced by plaintiff it appears that the basic contested issues which emerge from his appeal are (1) whether the District Court abused its discre-

[1] Jurisdiction was not obtained over the other defendants and on March 13, 1962, The House of Seagram, Inc., defendant-appellee, was substituted for the original defendant Browne-Vintners Co., Inc. as the surviving corporation resulting from a merger of the two Delaware corporations.

tion in entering the judgment order of dismissal, and (2) whether the court erred by entering such a final judgment without making and entering express findings of fact and conclusions of law.

The dismissal action was taken by the court *sua sponte* after the trial judge had waited an hour beyond the appointed time for plaintiff and his counsel to appear on the second day of the trial. In taking such action the trial judge pointed out that on numerous other occasions the case had been continued because of inability of the plaintiff to be ready for trial and that at all times counsel for the plaintiff had been late.

The record discloses that about thirty days prior to March 12, 1962, the cause was set for trial[2] on that date with the explicit understanding that the case would be tried at that time. On the call of the case, March 12, 1962, both sides waived opening statements. Counsel for the plaintiff requested and was granted a short recess to complete the marking of certain exhibits. Plaintiff's counsel then proceeded to offer in evidence as plaintiff's exhibits 1 to 66, inclusive, certain documents consisting of articles of incorporation and annual reports of Browne-Vintners Co., Inc. and other corporations. Following a colloquy precipitated by defendant's objection to the admissibility of these exhibits the trial judge announced he would proceed by first hearing the testimony of the plaintiff. The offer of the exhibits was temporarily withdrawn.

Counsel for plaintiff stated that he was then at the point where he had meant to put the plaintiff on the stand but he would not be ready to so proceed that afternoon because the plaintiff was not then in fit condition to testify due to inadequate sleep for two nights because of tooth trouble. Counsel advised the court that there was every reason to believe that the plaintiff would be able to testify on the following morning. On interrogation by the court the plaintiff stated that he had slept about three hours the night before, and but about two hours the night before that; that

---

[2] An order had previously been entered under Rule 21 of the District Court that the issue of liability be tried separately and first.

he was physically able to testify but mentally tired and unable to testify.

The court then put the case over until 10:30 A. M. the next day, March 13, 1962, but admonished plaintiff and his counsel that:

> "I will expect to proceed expeditiously * * *. We will start at ten-thirty tomorrow morning. I will expect counsel to be here, and we will put in a full court day until this is disposed of."

and that there be "no delay either in marking or anything else during the balance of the trial." Neither plaintiff nor his counsel made any objection.

On the following day, neither plaintiff nor his counsel was in court at 10:30 A. M. and they had not arrived by 11:30 A. M. The court in dismissing the cause, with prejudice for want of prosecution made the following statement for the record:

> "The Court wishes to state for the record that this case was called for trial on March 12. It had been set some thirty days in advance with the explicit and complete understanding that this case would be tried at that time.
>
> Counsel for the plaintiff appeared with the plaintiff and at that time moved for a continuance, giving as an excuse that the plaintiff had not had enough sleep as a result of tooth difficulties, to proceed with the trial. After careful consideration the Court continued this case until this morning at 10:30, with the explicit understanding that counsel would be here.
>
> It is now 11:30, and counsel for the plaintiff has not shown up in this cause. On numerous other occasions this case had to be continued because of inability of the plaintiff to be ready for trial. At all times counsel for the plaintiff has been late. * * *
>
> I am of the opinion that this plaintiff and plaintiff's counsel have taken advantage of the Court here."

The court noted that plaintiff's counsel was the same attorney whose failure to appear for a pre-trial conference had resulted in a dismissal of the plaintiff's action in *Link* v. *Wabash Railroad Company*, 7 Cir., 291 F. 2d 542, affirmed 370 U.S. 626.

The plaintiff points to no justification for his and his counsel's failure to appear at the appointed time for the resumption of the trial but contends that because the trial court had not been yet informed as to the cause of the delay at the time it entered the order of dismissal it was without authority to make such a disposition of the cause. We are not persuaded by such contention. The District Court was obviously aware of the ground upon which it predicated its action. That it was unaware of the justification, if any existed, for the failure of plaintiff and his counsel to appear is of no import in the posture in which the case reaches us. We do not have for consideration here any question of abuse of discretion in failing to grant relief from a judgment of dismissal but only a question as to the propriety of the original exercise of the power of dismissal on the facts disclosed. The plaintiff elected to appeal the case in this posture. We are of the opinion that *Link* v. *Wabash Railroad Company*, *supra*, is fully dispositive of that issue. It was there pointed out (370 U.S. 626, 629-33) that:

> "The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts.
>
> * * * * * * *
>
> The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power', governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. * * *
>
> Nor does the absence of notice as to the possibility of dismissal or failure to hold an adversary hearing

necessarily render such a dismissal void. It is true, of course, that 'the fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked'. *Anderson National Bank* v. *Luckett*, 321 U.S. 233, 246. But this does not mean that every order entered without notice and a preliminary adversary hearing offends due process. The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct. The circumstances here were such as to dispense with the necessity for advance notice and hearing.

In addition, the availability of a corrective remedy such as is provided by Federal Rule of Civil Procedure 60(b)—which authorizes the reopening of cases in which final orders have been inadvisedly entered—renders the lack of prior notice of less consequence. * * *

Whether such an order can stand on appeal depends not on power but whether it was within the permissible range of the court's discretion."

And here, as in *Link* (p. 636) plaintiff points to nothing to indicate that the failure to appear "was other than deliberate or the product of neglect."

It is our conclusion from a careful scrutiny of the record, including consideration of the history of the antecedent delays in the cause as well as the circumstances surrounding the incident which ultimately precipitated the dismissal, that there was no abuse of discretion in the District Court's dismissal of plaintiff's action.

We find no merit in plaintiff's contention that the failure of the District Court to make and enter express findings of fact and conclusions of law requires a reversal of its judgment of dismissal. The summary jurisdiction here exercised was not within the purview of Rule 52(a) of the Federal Rules of Civil Procedure (28 U. S. C. A.). Plaintiff's action was not "tried upon the facts". It was dismissed

for plaintiff's failure to proceed with the trial upon the facts at the appointed time. And, in any event, the district judge's statement for the record was sufficient to indicate the factual basis for the ultimae conclusion and action, within the spirit and intent of Rule 52(a), and to adequately fulfill the rule's purpose as an aid to the appellate court on review.

Plaintiff has addressed part of his argument to the propriety of the order substituting defendant-appellee for Browne-Vintners Co., Inc., the original party defendant. Apart from the fact that the order of substitution is beyond the scope of plaintiff's notice of appeal, he has pointed to nothing which in our opinion made the substitution erroneous or adversely affected the court's jurisdiction.

The judgment order of the District Court is affirmed.

AFFIRMED.

A true Copy:

Teste:

____, ____,

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT,
CHICAGO 10, ILLINOIS

Monday, February 11, 1963

Before: Hon. Win G. Knoch, Circuit Judge, Hon. Latham Castle, Circuit Judge, Hon. Roger J. Kiley, Circuit Judge.

No. 13815

CARLOS ESTEVA, JR., *Plaintiff-Appellant,*

vs.

THE HOUSE OF SEAGRAM, INC., *Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

Filed March 13, 1963. Kenneth J. Carrick, Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 13815

CARLOS ESTEVA, JR., *Plaintiff-Appellant,*

vs.

THE HOUSE OF SEAGRAM, INC., *Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
Honorable Edwin A. Robson, Judge Presiding

Appellant's Petition for Rehearing

The plaintiff-appellant respectfully petitions for a rehearing herein on each of the following grounds:

I

Appellant respectfully urges that the District Court's judgment, and this Court's decision affirming it, are each void for failure of the record to affirmatively show diversity jurisdiction of the subject matter at the time the judgment was rendered.

A

The District Court's record, brought up here in *complete* original form, and printed in essential parts in "Appellant's Record Appendix" in this Court, *fails to show affirmatively on the face of the record, that the District Court had diversity jurisdiction of the subject matter at the time of rendering the final judgment appealed from,* dismissing with prejudice the plaintiff-appellant's action, on the merits.

Nothing has been added in this Court's record (and probably could not be) to show that the District Court

then had jurisdiction of the *subject matter*, or that this Court had jurisdiction of the *subject matter* at the time of rendering its decision on the merits affirming said judgment below.

Diversity was the sole basis of federal jurisdiction of the subject matter of this case, as indicated in the opening sentence of this Court's opinion. The complaint, filed on September 8, 1955, alleged diversity *as between the plaintiff and Brown-Vintners Co., Inc.* (the only defendant who was served with summons or who appeared and answered in this case),—consisting of the fact that he was then "a citizen and resident of the Commonwealth of Puerto Rico" and that said corporate defendant was then "a corporation organized and existing under the laws of Delaware". (Rec. Appendix, p. A-8).

B

Though the record thus showed diversity jurisdiction at the commencement of the action,—this *original showing of* diversity jurisdiction *was destroyed*, and the District Court's record was *put in a condition whereby it failed to show* diversity jurisdiction of the *subject matter*, by acts of the defense counsel and the Judge immediately preceding the entry of this dismissal judgment, and *at the time said judgment was entered*. This final, fatal *uncertainty* as to jurisdiction is shown by the record as follows:

This action *was submitted for trial* and trial was commenced and "Evidence heard in part for plaintiff", on its scheduled trial date, March 12, 1962, as an action between the *original* parties, plaintiff v. *Brown-Vintners Co., Inc.* (Rec. Appendix, p. A-37; District Court Clerk's original record, p. 314).

On the second day of trial, *a new defendant, The House of Seagram, Inc.* was *substituted* in place of said original defendant by defense counsel, made on a motion blank in the court room, reading:

> "to *substitute* party defendant (Def. Browne-Vintners, Inc. having *merged into The House of Seagram, Inc.*, a Del. Corpn. on Jan. 22, 1962)" (Our italics). (Rec. Appendix, p. A-38; original record, p. 316).

This "motion" was granted instanter by the Court's entry on the same motion blank, reading:

> "On deft. motion leave to *substitute* as party deft., *The House of Seagram, Inc. in lieu* of deft. *Browne-Vintners, Inc.*" (Our italics) (Rec. Appendix, p. A-38)

No other record of this *substitution* exists in the District Court's record except the following docket sheet entry:

> "3/13/62 On defts mo order leave to *substitute* deft *The House of Seagram, Inc. in lieu* of deft. *Browne-Ventners Co. Inc.*—Robson, *J.*" (Our italics) (Rec. Appendix, p. A-39; original record; p. 315).

And the reporter's complete transcript of the proceedings on said date, which very informally shows the making and granting of said motion at 11:30 A.M. on March 13, 1962, before arrival of plaintiff and his counsel at the courtroom (Rec. Appendix, p. A-32 bottom), *which was about one minute before the making of the final dismissal judgment*, on the Court's own motion, *in favor of this new defendant*, "with prejudice", against the plaintiff-appellant.

From a standpoint of diversity jurisdiction of the subject matter, the above record made by the defense counsel and the Judge created a fatal jurisdictional defect in the record below, and here, because:

Passing, without waiving, the fact that the *sole description* of said *substituted* defendant in said motion (the *order* of substitution is *silent* on the subject), as being "a Del. Corpn." is fatally insufficient under Supreme Court decisions,—the *1958 Amendment* of *28 USCA 1332* imposes a *dual citizenship* upon all *corporations* in *all diversity* cases, namely, the state wherein it is *incorporated*, and the state wherein it "*has its principal place of business*". *Failure of the record to show the latter is fatal to diversity jurisdiction.*

Browne v. *Hartford Fire Ins. Co.* (1959, N.D. Ill., Judge Campbell) 168 F. Supp. 796, 797-780).

Washington etc. v. *Roberts & Schaefer Co.* (1960) Calif.) 180 F. Supp. 15, 17-18.

C

We deem it unnecessary to elaborate to this learned Court, the elementary set of principles that:

A *threshold* duty rests upon all federal courts, District to Supreme, *at all stages* of a case, for the Court to "satisfy itself" concerning *its own* jurisdiction of the *subject matter*, and that of *all courts below* it, *on its own motion*, regardless of *whether raised* by any party, regardless even of attempted jurisdictional *agreement* of the parties. From the days of Chief Justice Marshall down to today, "*It is not sufficient that jurisdiction may be inferred* argumentatively from the averments". *The burden of showing this jurisdiction rests upon the party invoking it*,—usually the plaintiff in original cases; or the removing defendant in removal cases,—*but here the burden is on this new defendant which entered this case as a substitute for the original defendant.*

Browne-Keene (1834) 8 Peters 112, 115-116, 8 L. Ed. 885, 886.

Indianapolis v. Chase Nat. Bank (1941) 314 U.S. 63.

American Fire & Cas. Co. v. Finn (1951) 341 U.S. 6.

D

We respectfully urge that this Court's opinion defaults the above "threshold" duty.

This fatal jurisdictional defect is plain on the face of the record. (Rec. Appendix, pp. A-37-A-39).

It was suggested in Appellant's Brief, pp. 8-9, p. 11 point A, p. 12, proposition II.

It was totally ignored in Appellee's Brief.

It was strongly argued on all the above points by Appellant's counsel at oral argument of this case. It was again ignored by appellee's counsel at oral argument.

It is totally ignored in this Court's opinion. The reference to the substitution of The House of Seagram in a footnote at page 1, goes only to explain the change of defendants, by a "merger". But there is no hint anywhere in the opinion that this fatal jurisdictional question exists,—much less a decision of it.

NOTE: The remaining questions raised by appellant in this appeal, and decided (we think erroneously) in the opinion, are not waived by failure to re-present them in this Petition. Shortness of time to meet the extended deadline for filing the Petition, plus our conviction that the above jurisidictional question is conclusive, causes their omission.

Wherefore, the plaintiff-appellant respectfully prays a rehearing of this appeal, a reversal of the judgment below, and for all other proper relief.

Respectfully submitted,

JAY E. DARLINGTON,
Attorney for Plaintiff-Appellant.

Filed March 15, 1963. Kenneth J. Carrick, Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 13815

CARLOS ESTEVA, JR., *Plaintiff-Appellant,*

vs.

THE HOUSE OF SEAGRAM, INC., *Defendant-Appellee*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
Honorable Edwin A. Robson, Judge Presiding

APPELLANT'S MOTION FOR ORAL ARGUMENT BEFORE THE COURT EN BANC ON HIS PETITION FOR REHEARING

To: The Honorable, the Chief Judge and Associate Judges of the United States Court of Appeals

The Plaintiff-Appellant herein respectfully petitions this Honorable Court:

1. To exercise its discretion to sit en banc to hear oral argument upon his Petition for Rehearing in this case at the Court's convenience.

2. Alternatively, in the event oral argument be not granted, that this Court may nevertheless consider and rule upon said Petition for Rehearing en banc.

And in support of this Motion, the plaintiff-appellant respectfully shows:

1. On March 13, 1963, this plaintiff-appellant, within the extended time, filed in this Court the required number of printed copies of his said Petition for Rehearing. Said Petition is short (six pages) and the plaintiff-appellant re-

spectfully calls same to the Court's attention without exhibiting or discussing same at length in this Motion.

2. Said Petition for Rehearing is devoted entirely to his contention that the complete record of the District Court in this appeal shows on its face a fatal jurisdictional defect which existed at the time the judgment appealed from was entered, and that this defect inheres likewise in this Court's opinion and decision. Briefly, this defect consists of the fact that on the second day of trial, the District Court, upon a very informal motion of defense counsel, *substituted* "in lieu" of the sole corporate defendant, a new corporate defendant, with no proper showing of diversity between the plaintiff and the latter corporation, as required by the 1958 amendment of 28 U.S.C.A. 1332.

3. These same jurisdictional defects, apparent on the face of the record of the District Court's judgment, were indicated in Appellant's Brief, ignored in Appellee's Brief, vigorously argued at the outset of appellant's oral argument in this Court. Nevertheless, as appears on the face of this Court's opinion, and as pointed out in the pending Petition for Rehearing (p. 5), *this Court's opinion completely fails to notice or mention*,—much less decide,—this "threshold" question of *jurisdiction of the subject matter* below and here, but simply goes ahead and decides questions on the merits of the case, and affirms the allegedly *void* judgment below.

4. Thereby, plaintiff-appellant respectfully urges that said opinion and decision *violates the constitutional and statutory jurisdiction of this Honorable Court, and violates all the Supreme Court precedents* concerning the jurisdictional limitations and jurisdictional duty of this Honorable Court.

5. Plaintiff-appellant respectfully urges that this failure to mention or decide (one way or the other) this basic jurisdictional question apparent on the face of the record and urged by appellant's counsel in oral argument, deserves consideration by this Honorable Court en banc, preferably with oral argument, as above requested.

WHEREFORE, Plaintiff-appellant respectfully prays relief as above stated at the beginning of this Motion, and for all further just and proper relief in the premises.

JAY E. DARLINGTON,
306 Hammond Building,
Hammond, Indiana,
WE 1-2264.

VERIFICATION AND PROOF OF SERVICE

STATE OF INDIANA,
County of Lake, ss:

Jay E. Darlington, being first duly sworn, says that he makes this affidavit as attorney herein for the plaintiff-appellant as he is authorized to do, that the fact allegations of the above Petition are true to his best knowledge and belief; and that this Motion is presented in good faith and not for purpose of delay.

Affiant further says that on this date, March 14, 1963, he served a true copy of this Motion upon counsel for defendant-appellee, Messrs. Louis Kohn and Patrick O'Brien, 231 South LaSalle Street, Chicago, Illinois, by duly mailing same by first class, United States mail, at the same time for mailing this Motion to the Clerk of this Court.

JAY E. DARLINGTON.

Subscribed and sworn to before me this 14th day of March, 1963.

ROSE WILDER,
Notary Public.

My commission expires July 9, 1965.

Filed March 19, 1963. Kenneth J. Carrick, Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 13815

CARLOS ESTEVA, JR., *Plaintiff-Appellant,*

vs.

THE HOUSE OF SEAGRAM, INC., *Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
Honorable Edwin A. Robson, Judge Presiding

ANSWER TO APPELLANT'S PETITION FOR REHEARING

There Is No Merit to Appellant's Jurisdictional Argument

The first major flaw in plaintiff-appellant's argument is his failure (Pet. p. 2) to recognize that the jurisdiction of the district court in this case was determined when the suit began in 1955. *Boesenberg* v. *Chicago Title and Trust Co.*, 128 F.2d 245, 247 (C.A. 7, 1942); *Mahlum* v. *Carlson*, 304 F.2d 285, 289 (C.A. 9, 1962); *Janzen* v. *Goos*, 302 F.2d 421, 425 (C.A. 8, 1962). This being the case, and since no question is now raised as to jurisdiction when plaintiff commenced this action, it obviously is of no consequence that, subsequently, another Delaware corporation, The House of Seagram, Inc., was substituted for the original Delaware corporation defendant, Browne-Vintners Co., Inc.

Plaintiff-appellant's reliance (Pet. p. 4) on the 1958 amendment to 28 USC 1332 is also misplaced. The amendment in question, Public Law 85-554 of July 25, 1958, stated: "This Act shall apply only in the case of actions commenced after the date of the enactment of this Act" (72 Stat. 415). Thus the amendment of 1958 had no effect on this 1955 lawsuit.

For the above reasons, it is respectfully submitted that the Petition for Rehearing should be denied.

LOUIS A. KOHN,
PATRICK W. O'BRIEN,
231 S. LaSalle Street,
Chicago 4, Illinois
Attorneys for Defendant-Appellee
The House of Seagram, Inc.

MAYER, FRIEDLICH, SPIESS,
TIERNEY, BROWN & PLATT,
Of Counsel.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Monday, April 15, 1963

Before: Hon. Win G. Knoch, Circuit Judge, Hon. Latham Castle, Circuit Judge, Hon. Roger J. Kiley, Circuit Judge.

No. 13815

CARLOS ESTEVA, JR., *Plaintiff-Appellant*,

vs.

THE HOUSE OF SEAGRAM, INC., (Browne-Vintners Co., Inc.), *Defendant-Appellee*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

IT IS HEREBY ORDERED that appellant's petition for a rehearing of this cause be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Monday, April 15, 1963

Before: Hon. John S. Hastings, Chief Judge, Hon. F. Ryan Duffy, Circuit Judge, Hon. Elmer J. Schnackenberg, Circuit Judge, Hon. Win G. Knoch, Circuit Judge, Hon. Latham Castle, Circuit Judge, Hon. Roger J. Kiley, Circuit Judge, Hon. Luther M. Swygert, Circuit Judge.

No. 13815

CARLOS ESTEVA, JR., *Plaintiff-Appellant*,

vs.

THE HOUSE OF SEAGRAM, INC., (Browne-Vintners Co., Inc.), *Defendant-Appellee*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

IT IS ORDERED by the Court that appellant's motion, filed March 15, 1963 for oral argument before the Court en banc on his petitioner for rehearing or in the alternative that the petition be given en banc consideration, be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

I, KENNETH J. CARRICK, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing — pages contain a true copy of

1. The opinion of this Court filed on February 11, 1963,
2. The judgment of this Court entered on February 11, 1963,
3. The appellant's petitioner for rehearing, filed in this Court on March 13, 1963,
4. The appellant's motion for oral argument before the Court en banc on his petition for rehearing, filed in this Court on March 13, 1963,
5. The appellee's answer to appellant's petition for rehearing, filed in this Court on March 19, 1963,
6. The order entered on April 15, 1963 by this Court denying appellant's petition for rehearing and
7. The order entered on April 15, 1963 by this Court denying appellant's motion for oral argument before the Court en banc on his petition for rehearing.

Cause No. 13815

CARLOS ESTEVA, JR., *Plaintiff-Appellant,*

vs.

THE HOUSE OF SEAGRAM, INC., *Defendant-Appellee*

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-first day of May A. D. 1963.

KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.

by: THOMAS F. STRUBBE, *Deputy Clerk.*

(Seal.)

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